



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway
New York, NY 10007-1866

October 25, 2022

VIA EMAIL ONLY

Mayor Alberto Santos
Town of Kearny
402 Kearny Avenue
Kearny, NJ 07032
mayor@kearnynj.org

RE: Syncon Resins Site, Kearny, New Jersey

Honorable Mayor Santos:

This letter memorializes the conference call discussions that were held between the Town of Kearny ("Town") and the U.S. Environmental Protection Agency ("EPA") related to the property comprising the Syncon Resins Superfund Site (the "Site" or "Property"). During our discussions concerning the future use of the Property, you requested that we provide you with a Superfund comfort/status letter.

The purposes of this comfort/status letter are to provide you with information that may be relevant to the potential Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, ("CERCLA") liability concerns you have identified at the Property and summarize the relevant information available to EPA about the Site as of the date of this letter. We hope this information will enable you to make informed decisions as you move forward with your plans regarding the Property.

Under CERCLA (commonly referred to as Superfund),¹ the Agency's mission is to protect human health and the environment from risks posed by exposure to contaminated or potentially contaminated land, water, and other media. A Superfund cleanup can help return these properties to productive reuse. We are providing this letter consistent with the Agency's 2019 Comfort/Status letter policy.²

¹ 42 U.S.C. Section 9601, *et seq.*

² See 2019 Policy on the Issuance of Superfund Comfort/Status Letters: <https://www.epa.gov/enforcement/comfortstatus-letters-guidance>

Based on our previous discussions, EPA understands that the Town is considering acquiring the Property by foreclosure and then facilitating its acquisition by a private developer or business that would restore the Property in accordance with the Town's future redevelopment plan and return it to commercial use (the "Development").

Property Status

Interested parties can find information on sites that are, or potentially are, contaminated and may warrant action under Superfund, including site-specific documents and fact sheets, in the Superfund Enterprise Management System ("SEMS").³ This Site is located in SEMS and is on the National Priorities List ("NPL"). <https://www.epa.gov/superfund/syncon-resins>.

For the reasons stated below, we are addressing the Site under Superfund remedial authority.

History and Status of the Site

The Syncon Resins Site is comprised of three lots, number 12, 13, and 13R of Block 289 of the Tax Map of the Town of Kearny encompassing approximately 15 acres in a heavily industrialized area of northern New Jersey. The Site is situated on the peninsula formed by the Passaic and Hackensack Rivers.

The Syncon Resins facility's operations produced alkyd resin carriers for pigments, paints, and varnish products. Most of the former facility's operations consisted of reprocessing resins purchased from other manufacturers. Six main buildings and seven ancillary structures were used in process-related activities on the Site. There were at least two chemical reactor buildings that contained stainless steel vessels. Other various buildings and structures filled the Site, including numerous large bulk storage tanks, two unlined lagoons used for discharging process wastewater, and an unknown number of underground tanks and associated piping systems. Investigations of the Site found extensive contamination of the groundwater, soil, buildings, vessels, and tanks.

Between late 1982 to early 1984, the New Jersey Department of Environmental Protection ("NJDEP") removed all the exposed 55-gallon drums from the Site. In early 1990, the Site was fenced to provide additional security during cleanup. Based on the results of the Site investigation, EPA selected the following remedial actions in a 1986 Record of Decision (ROD): 1) removal of the contents of the storage tanks and vessels for off-site disposal; 2) decontamination of buildings and tank structures as necessary; 3) excavation of lagoon liquids, sediments, and contaminated surface soil for off-site disposal; 4) installation of a cover over the Site that allows natural flushing of underlying soil and groundwater contaminants; 5) collection and treatment of contaminated water from the shallow aquifer, with discharge to the Passaic River; and 6) performance of supplemental studies to evaluate methods to enhance the effectiveness of flushing and/or treatment and destruction of the

³ SEMS is available at on the Agency's website at <https://cumulis.epa.gov/supercpad/cursites/srchsites.cfm>.

contaminated soils. By NJDEP's removal of all the 55-gallon drums and securing the Site, the threat of exposure to hazardous materials was greatly reduced. NJDEP performed the groundwater remedy selected in the 1986 ROD and is currently performing operation and maintenance activities related to the groundwater treatment system and to the Site.

Upon issuing the 1986 ROD, EPA divided the Site into two operable units ("OUs"). Operable Units are sub-divisions within a Site which may include different media or distinct areas within a Site depending on the complexity of the contamination associated with the Site. Operable Unit 1 ("OU1") addresses Sitewide groundwater contamination through the remedy selected in the OU1 ROD, and Operable Unit 2 ("OU2") addresses soil contamination.

OU2 was established in the 1986 ROD to conduct supplemental studies to enhance the existing remediation system at the Site and to address the removal of the free product source of contamination. A focused feasibility study ("FFS") was finalized by the NJDEP in July 1998 and a proposed plan was released to the public for comment on September 21, 1999. On September 27, 2000, EPA issued a ROD for OU2 which selected the following remedial actions: excavation and drainage of contaminated soils, removal of buried debris, and installation of a connecting drainage layer. Following NJDEP's completion of a pre-design investigation ("PDI"), EPA determined that it would not be feasible to implement the remedy selected in the 2000 OU2 ROD because the contaminants in Site soils, including total petroleum hydrocarbons and PCBs, would not drain from the soil as anticipated in the ROD.

On September 18, 2007, at NJDEP's request, EPA assumed the lead responsibility for Site activities for OU2 and in July 2008, EPA conducted additional field investigations. EPA issued an FFS report on August 10, 2010, and a ROD amendment for OU2 on September 30, 2010. The OU2 remedy, as set forth in the ROD amendment, consisted of excavation of soils exceeding remediation goals (RGs), to a depth of about 12.5 feet; post-remediation sampling to verify achievement of RGs; treatment and/or disposal of excavated soils at off-site facilities in accordance with applicable regulatory requirements; backfilling of recovered existing gravel from completed excavation areas to the bottom portion of the excavation; backfilling of excavated areas with imported clean fill; and implementation of institutional/engineering controls. EPA completed the design to implement the amended OU2 remedy in October 2012. EPA funding to start the cleanup for OU2 became available in August 2015, and EPA began the work in October 2016. EPA completed construction of the OU2 remedy in October 2018.

In addition to finding more information regarding the Site through SEMS, you can also view a copy of the Site's Administrative Record at the Kearny Main Public Library, 318 Kearny Avenue, Kearny, New Jersey 07032 ((201) 998-2666).

Reuse of the Property

From the information you previously provided, EPA understands that the expected Development will be for commercial purposes, possibly warehousing. Please note that, to ensure the remedy remains protective of human health and the environment, any Development must be compatible with the

EPA's cleanup actions and institutional controls⁴ designed to protect the remedy and prevent unacceptable exposure to residual contamination. As of the date of this letter, we have not identified any obvious incompatibility between the proposed use of the Property as you have described and EPA's selected cleanup for the Site. As your plans develop further, please continue to discuss the Development with us.

CERCLA Section 101(20)(D) State and Local Government Liability Exemption

EPA understands that you are interested in information regarding the state and local government liability exemption provision of CERCLA. In 2018, Congress enacted the Brownfields Utilization, Investment, and Local Development Act of 2018 ("BUILD Act").⁵ CERCLA Section 101(20)(D), as amended by the BUILD Act, provides liability protection to local governments⁶ that may exempt them under certain circumstances from being an "owner" or "operator" and thus may protect them from potential CERCLA liability.

The BUILD Act amended CERCLA Section 101(20)(D) to add a new category of exempt acquisitions, "through seizure or otherwise in connection with law enforcement activity" and to remove the requirement that state and local governments must acquire title to property "involuntarily." Section 101(20)(D) now states that a "unit of State or local government which acquired ownership or control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government acquires title by virtue of its function as sovereign" is exempt from the definition of "owner or operator" if that government entity did not cause or contribute to the release or threatened release of a hazardous substance from the facility. Please note that some actions or omissions during ownership (such as dispersing contaminated soil during excavation and grading and failing to prevent the release of hazardous substances) may cause or contribute to a release of hazardous substances from a property and make the local government ineligible for the exemption.⁷

On June 15, 2020, EPA issued guidance that describes the Agency's enforcement discretion policies that may apply to state and local governments and to your situation.⁸ The Local Government Guidance

⁴ Appropriate institutional controls and a Classification Exception Area ("CEA") are required to be placed on the Property to ensure the continued protectiveness of the soil and groundwater remedies.

⁵ Brownfields Utilization, Investment, and Local Development Act of 2018, Division N of Pub. L. No. 115-141, 132 Stat. 1052 (March 23, 2018).

⁶ Many of the references to "local governments" in this letter and to CERCLA's liability protections are also applicable to state governments.

⁷ For additional discussion of post-acquisition activities that may or may not be considered releases under CERCLA, see the disposal discussion beginning on page 8 of the EPA's *Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners* ("Common Elements Guidance"), July 29, 2019, available on the Agency's website at <https://www.epa.gov/enforcement/common-elements-guidance>.

⁸ See *Superfund Liability Protections for Local Government Acquisitions after the Brownfields Utilization, Investment, and Local Development Act of 2018* ("Local Government Guidance"), (June 15, 2020), available on the Agency's website at <https://www.epa.gov/enforcement/guidance-superfund-liability-protections-local-government-acquisitions>.

provides:

The CERCLA § 101(20)(D) exemption from owner or operator liability includes circumstances in which a local government acquires title to property “by virtue of its function as sovereign.” This phrase is undefined in the statute. To provide clarity to local governments, the EPA generally intends to exercise its enforcement discretion to treat a local government acquisition as “by virtue of its function as sovereign” only when the government acquires title to the property by exercising a uniquely governmental authority via a function that is unique to its status as a governmental body.

Based on the information EPA currently has on your situation, described above, should the Town acquire the impacted Property by foreclosure, the CERCLA Section 101(20)(D) exemption may apply. Courts, not EPA, are the final arbiter of whether a party has achieved a liability protection. Thus, EPA recommends that you consult your legal counsel to assess whether you satisfy each of the statutory requirements necessary to achieve and maintain the state and local government liability exemption. In cases where it is unclear whether the CERCLA Section 101(20)(D) exemption applies—or when a local government wishes to obtain additional liability protection—EPA encourages local governments to achieve and maintain Bona Fide Prospective Purchaser (BFPP) status pursuant to CERCLA Sections 101(40) and 107(r), described below.

CERCLA’s Bona Fide Prospective Purchaser Liability Protection

Congress amended CERCLA in 2002 to protect certain parties who buy contaminated or potentially contaminated properties from CERCLA liability if they qualify as BFPPs. The BFPP provision provides that a person who meets the criteria of CERCLA Sections 101(40) and 107(r)(1), and who purchases the property after January 11, 2002, will not be liable as an owner or operator under CERCLA.

A key advantage of the BFPP provision is that it is self-implementing, therefore, the Agency is not involved in determining whether a party qualifies for BFPP status. A party, on its own, can achieve and maintain status as a BFPP, which provides statutory protection from CERCLA liability, without entering into an agreement with EPA, so long as that party meets the threshold criteria and continuing obligations identified in the statute.⁹

Among other criteria outlined in CERCLA, a BFPP must take “reasonable steps” to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resources exposure to any previously released hazardous substances as required by CERCLA Section 101(40)(B)(iv). This requirement is explored further in the Common Elements Guidance.¹⁰ Based upon your representation of your situation and the information currently available to the EPA about the conditions at the Site, the BFPP provision may apply to your situation. Note that courts,

⁹ See *Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners* (“Common Elements”) (“Common Elements Guidance”) (July 29, 2019), available on the Agency’s website at <https://www.epa.gov/enforcement/common-elements-guidance>.

¹⁰ *Id.*

rather than the EPA, ultimately determine whether a landowner has met the criteria for BFPP status. Thus, the EPA recommends that you consult with your legal counsel to assess whether you satisfy each of the statutory requirements necessary to achieve and maintain BFPP status. As another basis for liability protection, the EPA generally encourages local governments to consider layering their available liability protections and to establish and maintain BFPP status even when another liability protection may apply.

By making the BFPP liability protection subject to the obligation to take “reasonable steps,” EPA believes Congress intended to protect certain landowners from CERCLA liability while at the same time recognizing that these landowners should act reasonably, in conjunction with other authorized parties, in protecting human health and the environment. As noted above, EPA completed a remedial action for soil at the Site in 2018 and NJDEP is currently performing operation and maintenance activities related to the groundwater treatment system and to the Site. EPA has identified several environmental concerns with potential Development of the Site. Based on the information we have evaluated, we believe that the reasonable steps related to the remaining contamination found at the Site include:

1. Prohibit public or private wells to be installed on the Property for irrigation or consumption purposes.
2. Refrain from digging, disturbing soil, disturbing the water treatment plant and existing pumping and monitoring wells, or constructing non-mobile structures, including non-mobile solar panels, or parking lots without prior review and approval from the EPA.
3. Call EPA Region 2’s Emergency Response Center hotline at (877) 251-4575 to report the discovery or release of any hazardous substances.
4. Ensure that contracts or agreements associated with the Development include requirements that the future owner implement, record and/or establish institutional controls pursuant to Section 101(40)(F) of the Superfund law, including the establishing a Classification Exception Area (“CEA”) for groundwater use at the Property, in accordance with EPA’s RODs for the Site.
5. Avoid performing any activities or constructing any structures that will or may interfere with the EPA’s or NJDEP’s on-going cleanup, long-term maintenance activities, or exacerbate contaminated media at the Property.
6. Notify EPA of 1) any and all planned and scheduled work to be conducted, including, but not limited to any work for NJDEP, 2) any potential and planned change of ownership or usage of the Site, and 3) any official township or community concerns brought to the developers’ attention.

7. Ensure that contracts or agreements provide EPA with consent to access to the Site for the duration of the ownership or operation of any activities at the Site by the developers or any affiliate of the developers, including the duration of any ownership or operation of any successors and assigns of an affiliate of the developers.
8. Provide EPA with copies of developer's specifications, drawings, reports, project schedules or other related information pertaining to the Development of the Site.

Any reasonable steps suggested by EPA are based on the nature and extent of contamination currently known to the Agency and are provided as a guide to help you as you seek to reuse the Property. Because a final determination about which steps are reasonable would be made by a court rather than EPA, and because additional reasonable steps may later be necessary based on Site conditions, this list of reasonable steps is not exhaustive. You should continue to identify reasonable steps based on your observation and judgment and take appropriate action to implement any reasonable steps whether or not EPA regional staff has identified any such steps.¹¹

Third Party and Innocent Landowner Defenses

CERCLA Section 107(b)(3) provides a "third party" affirmative defense to CERCLA liability for any owner, including a local government, that can prove, by a preponderance of the evidence, that the contamination was caused solely by an act or omission of a third party whose act or omission did not occur "in connection with a contractual relationship." An entity asserting a CERCLA Section 107(b)(3) defense also must show that it exercised due care with respect to contamination and that it took precautions against foreseeable acts or omissions, and the consequence thereof, by the third party that caused the contamination.

CERCLA's third-party defense includes an "innocent landowner defense" as an exclusion to the definition of "contractual relationship" in Section 101(35). The "innocent landowner defense" applies to entities that meet the criteria set forth in CERCLA Sections 101(35) and 107(b)(3). A "contractual relationship" under CERCLA Section 101(35)(A) does not include the scenario where "the defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfers or acquisition, or through the exercise of eminent domain authority by purchase or condemnation." As discussed in the Local Government Guidance, EPA generally intends to exercise its enforcement discretion to treat local governments that acquire property through escheat or eminent domain under certain circumstances as exempt under Section 101(20)(D). CERCLA Section 101(35)(A)(ii) provides an additional liability protection through an affirmative defense for these types of acquisitions, provided other requirements, including the exercise of due care, are satisfied. Based on the information EPA currently has on your situation, described above, should the Town acquire the impacted Property by foreclosure, the CERCLA Section 101(35)(A) innocent landowner defense may apply. Note that courts,

¹¹ CERCLA Section 101(40)(B)(iv) provides that "The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to (i) stop any continuing release; (ii) prevent any threatened future releases; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance."

rather than EPA, ultimately determine whether a landowner has met the criteria for the defense. Thus, EPA recommends that you consult with your legal counsel to assess whether you satisfy each of the statutory requirements necessary to achieve and maintain the defense.

Superfund Lien Pursuant to CERCLA Section 107(l).

EPA has filed notices of its Superfund liens on this Property pursuant to CERCLA Section 107(l) and is willing to seek resolution leading to release of the liens.

Windfall Lien Pursuant to CERCLA Section 107(r)

Although Congress provided liability protection under CERCLA for BFPPs to encourage the purchase and reuse of contaminated properties, the property they acquire may be subject to a windfall lien pursuant to CERCLA Section 107(r) if there are unrecovered response costs incurred by the United States and the response action increases the fair market value of the property. Unlike a CERCLA Section 107(l) lien ("Superfund lien"), a windfall lien is not a lien for all the Agency's unrecovered response costs. The windfall lien is limited to the lesser of the Agency's unrecovered response costs or the increase in fair market value attributable to EPA's cleanup.¹²

Based upon the information now available to EPA, the Agency is not in a position today to determine whether the windfall lien policy may apply to this Site.

State Actions

We can only provide you with information about federal actions at the Site, federal law and regulations, and EPA guidance. For information about potential state actions and liability issues, please contact the NJDEP.

Conclusion

EPA remains dedicated to facilitating the cleanup and beneficial reuse of contaminated properties and hopes the information contained in this letter is useful to you. You may find it helpful to consult your own environmental professional, legal counsel, and your state, tribal, or local environmental protection agency before taking any action to acquire, clean up, or redevelop the Property. These consultations may help you obtain a greater level of comfort about the compatibility of the proposed use and ensure compliance with any applicable federal, state, local, and/or tribal laws or requirements.

¹² For more information, please refer to the Agency's *Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA* ("Windfall Lien Policy") (July 16, 2003) available at <https://www.epa.gov/enforcement/interim-guidance-enforcement-discretion-concerning-windfall-liens-cercla-section-107r>.

If you have any additional questions or wish to discuss this information further, please feel free to contact me at (212) 637-3135 or the Remedial Project Manager, Pamela J. Baxter, Ph.D., CHMM, at (212) 637-4416.

Sincerely,

**Zizila,
Frances**

Digitally signed by
Zizila, Frances
Date: 2022.10.25
16:44:38 -04'00'

Frances M. Zizila
Assistant Regional Counsel

cc: Pamela J. Baxter, USEPA
Eric J. Wilson, USEPA
Elisabeth Freed, OSRE, USEPA
James P. Bruno, Esq., Castano Quigley